

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
=====X

BERNARD BERGERON,

Plaintiff,

-against-

LOWE'S HOME CENTERS, INC.,
WHIRLPOOL CORPORATION and
ROPER BRAND HOME APPLIANCES,

Defendants.

=====X

Case No. 08 CV 1860
Judge Brieant

**ANSWER TO
CROSS-CLAIM**

Defendants Whirlpool Corporation and Roper Brand Home Appliances
(which is not a legal entity and should be dismissed from this action) by its attorneys
Leader & Berkon LLP and Nall & Miller, LLP, as and for its Answer to Lowe's Home
Centers, Inc.'s Cross-claim responds as follows:

1. Whirlpool Corporation and Roper Brand Home Appliances deny the
allegations in Paragraph 18 of the Cross-claim.
2. Whirlpool Corporation and Roper Brand Home Appliances deny the
allegations in Paragraph 19 of the Cross-claim.

**AS AND FOR WHIRLPOOL CORPORATION'S
AND ROPER BRAND HOME APPLIANCES'
FIRST AFFIRMATIVE DEFENSE**

3. The Cross-claim fails to state a claim upon which relief may be
granted.

**AS AND FOR WHIRLPOOL CORPORATION'S
AND ROPER BRAND HOME APPLIANCES'
SECOND AFFIRMATIVE DEFENSE**

4. Defendant Roper Brand Home Appliances is incorrectly named in that it is not a legal entity and Roper Brand Home Appliances should be dismissed as a result thereof.

**AS AND FOR WHIRLPOOL CORPORATION'S
AND ROPER BRAND HOME APPLIANCES'
THIRD AFFIRMATIVE DEFENSE**

5. Plaintiff's damages, if any, were caused, in whole or in part, by Plaintiff's own culpable conduct, including, but not limited to, Plaintiff's contributory negligence and assumption of risk. In the event that Plaintiff is entitled to recover, the amount of damages should be diminished in proportion to the culpable conduct attributable to the Plaintiff.

**AS AND FOR WHIRLPOOL CORPORATION'S
AND ROPER BRAND HOME APPLIANCES'
FOURTH AFFIRMATIVE DEFENSE**

6. Plaintiff's alleged damages, if any, were caused, in whole or in part, by the independent intervening causes and events, and by third persons over whom and over which Defendants Whirlpool Corporation and Roper Brand Home Appliances exercised no control.

**AS AND FOR WHIRLPOOL CORPORATION'S
AND ROPER BRAND HOME APPLIANCES'
FIFTH AFFIRMATIVE DEFENSE**

7. The incident complained of in the Complaint and the alleged damages were caused by an alteration, modification and change of the product.

**AS AND FOR WHIRLPOOL CORPORATION'S
AND ROPER BRAND HOME APPLIANCES'
SIXTH AFFIRMATIVE DEFENSE**

8. Plaintiff's alleged damages were caused by the subsequent abuse of the product.

**AS AND FOR WHIRLPOOL CORPORATION'S
AND ROPER BRAND HOME APPLIANCES'
SEVENTH AFFIRMATIVE DEFENSE**

9. Plaintiff's claims are barred or reduced due to Plaintiff's failure to join necessary and indispensable parties.

**AS AND FOR WHIRLPOOL CORPORATION'S
AND ROPER BRAND HOME APPLIANCES'
EIGHTH AFFIRMATIVE DEFENSE**

10. Plaintiff's claims are barred by the spoliation of evidence or by the spoliation of evidence by others.

**AS AND FOR WHIRLPOOL CORPORATION'S
AND ROPER BRAND HOME APPLIANCES'
NINTH AFFIRMATIVE DEFENSE**

11. Plaintiff failed to mitigate or otherwise act to lessen or reduce the injury and damage, if any, allegedly resulting from the incident complained of in the Complaint.

**AS AND FOR WHIRLPOOL CORPORATION'S
AND ROPER BRAND HOME APPLIANCES'
TENTH AFFIRMATIVE DEFENSE**

12. The Cross-claim is barred, in whole or in part, by the applicable Statute of Limitations or laches.

**AS AND FOR WHIRLPOOL CORPORATION'S
AND ROPER BRAND HOME APPLIANCES'
ELEVENTH AFFIRMATIVE DEFENSE**

13. Plaintiff's injuries, if any, were proximately caused by the misuse of the alleged product.

**AS AND FOR WHIRLPOOL CORPORATION'S
AND ROPER BRAND HOME APPLIANCES'
TWELFTH AFFIRMATIVE DEFENSE**

14. No product, acts or omissions of Whirlpool Corporation and Roper Brand Home Appliances proximately caused the damages sought in this matter.

**AS AND FOR WHIRLPOOL CORPORATION'S
AND ROPER BRAND HOME APPLIANCES'
THIRTEENTH AFFIRMATIVE DEFENSE**

15. Whirlpool Corporation and Roper Brand Home Appliances are not liable because the alleged product was in conformity with the generally recognized state-of-the-art applicable to the safety of the product at the time that the product was designed, manufactured, packaged and labeled.

**AS AND FOR WHIRLPOOL CORPORATION'S
AND ROPER BRAND HOME APPLIANCES'
FOURTEENTH AFFIRMATIVE DEFENSE**

16. Whirlpool Corporation and Roper Brand Home Appliances reserve the right to raise and plead additional defenses which might become known during the course of discovery, as well as to dismiss any defenses which, as a result of discovery, are determined to be unsupported by a good faith reliance upon either the facts or the law, or a non-frivolous argument for extension, modification or reversal of existing law or the establishment of new law.

WHEREFORE, Whirlpool Corporation and Roper Brand Home Appliances demand judgment dismissing Lowe's Home Centers, Inc.'s Cross-claim against Whirlpool Corporation and Roper Brand Home Appliances with costs and disbursements, including reasonable attorney's fees, and such other and further relief as this Court may deem just and proper.

Dated: New York, New York
March 24, 2008

LEADER & BERKON LLP

BY: 

GLEN SILVERSTEIN (GS 9174)
DAVID A PAUL (DP 7629)
630 Third Avenue
New York, New York 10017
(212) 486-2400

-and-

GEORGE R. NEUHAUSER
NALL & MILLER, LLP
235 Peachtree Street, N.E., Suite 1500
Atlanta, Georgia 30303-1401
(404) 522-2200

*Attorneys for Defendants
Whirlpool Corporation and Roper
Home Appliances*

To: George Hodges, Esq.
WALSH & SLATER LLP
55 Church Street, Ste. 211
White Plains, NY 10601
Attorneys for Defendant Lowe's Home Centers

Robert Moson, Esq.
FINKELSTEIN & PARTNERS, LLP
436 Robinson Avenue
Newburgh, NY 12550
Attorneys for Plaintiff Bernard Bergeron